No. 87-1344

In the Supreme Court of the United States

OCTOBER TERM, 1987

EDWIN MEESE III, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., PETITIONERS

v.

JACK ABBOTT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR PETITIONERS

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

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1. Respondents' principal argument in opposition to the petition (Br. in Opp. 9-15) is that this case is not ripe for review. Respondents point out that the court of appeals has remanded the case for further proceedings, at which the district court is to examine the individual publications introduced by respondents at trial (see Pet. 5) to determine whether the Bureau of Prisons (BOP) properly withheld those publications under the "appropriate test" (Br. in Opp. 13). That approach, however, would achieve little and would be very burdensome to the BOP. The critical issue in this nationwide class action is not whether the particular publications introduced at trial should be admitted into federal prisons, but what the "appropriate test" for admitting publications in general should be—the heightened scrutiny standard of *Procunier* v. *Martinez*, 416 U.S. 396 (1974), or the reasonable relationship test applied by this Court in *O'Lone* v. *Estate of*

Shabazz, No. 85-1722 (June 9, 1987); *Turner* v. *Safley*, No. 85-1384 (June 1, 1987); and several other cases (see Pet. 9 (citing cases)). If, as we submit (Pet. 12-17), the court of appeals evaluated the BOP's regulations under the wrong standard, postponing review until after the remand has been completed would result in a waste of judicial resources and an unnecessary delay in resolving the important legal issue presented in this case. During the period of delay, all federal prisons would be forced to comply with the *Martinez* standard in determining whether to admit the thousands of publications that are presented for the BOP's review every year. That course would give rise to the very security risks that prompted the filing of this petition in the first place (see Pet. 17-19).

There is likewise no merit in respondents' contention (Br. in Opp. 9-13) that review is inappropriate because various individual publications introduced at trial as examples of publications withheld by federal prisons would not be rejected today at any federal facility. To begin with, while it is true that some of those publications would now be admitted in the federal system, the BOP advises us that a number of the publications would still be excluded today, particularly if prison wardens were permitted to apply the BOP's existing regulations.[1] Thus, even with respect to the individual publications, there is still a substantial dispute between the parties that will not disappear after a remand.

[1] For example, an issue of *Drummer* magazine (Resp. Exh. 20) contains a series of photographs, drawings, and articles depicting, in explicit detail, a wide range of sadomasochistic homosexual acts. Similarly, an issue of the *NS Report* (Resp. Exh. 21), a publication of the American Nazi Party, contains various white supremacist and racist articles that glorify violent physical assaults on blacks. The BOP has not changed its position with respect to these and several other publications introduced at trial.

More fundamentally, the ultimate disposition with respect to the individual articles is only one aspect of this case. Of far more significance, the court of appeals has struck down the BOP's regulations governing the admission of publications (Pet. App. 6a-17a), holding that the district court erred in refusing to apply the *Martinez* standard. It is that holding which the government seeks to have reviewed by this Court, and that holding is plainly ripe for review.[2]

2. In an effort to downplay the importance of the court of appeals' decision, respondents assert that the *Martinez* standard adopted by the court of appeals is not

[2] Contrary to respondents' contention (Br. in Opp. 13-14), this Court's decisions do not suggest that review by this Court is inappropriate simply because the court of appeals has remanded the case for further proceedings. Indeed, that contention is undermined by this Court's most recent decision in the prison regulation area, *O'Lone* v. *Estate of Shabazz, supra*. In *Shabazz*, the Court granted certiorari despite the court of appeals' remand to the district court for reconsideration, under a heightened scrutiny standard, of the constitutionality of certain prison policies (slip op. 4). The fact that the case had not yet gone back to the district court for further proceedings was no impediment to review by this Court.

This Court's opinion denying review in *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967), upon which respondents rely (Br. in Opp. 13-14), is readily distinguishable. In that case, the petition for a writ of certiorari was addressed to the validity of contempt citations issued by the district court in a labor dispute. The court of appeals had determined that the contemnors were entitled to a trial on a contested factual issue that might dispose of the contempt citations, and the court had remanded the case for that purpose (380 F.2d 570, 581-582 (D.C. Cir. 1967)). Accordingly, in contrast to the present case, there was a possibility that the entire posture of the case would change as a result of the remand. Moreover, unlike the present case, there was no indication that on remand the district court was to make the required factual findings under a contested legal standard.

an onerous or unreasonable one (Br. in Opp. 19-22, 29-30). In that regard, respondents criticize the government for referring to the *Martinez* standard as requiring "strict scrutiny" (Br. in Opp. 19-21).

In characterizing the *Martinez* standard as one of strict scrutiny, the government was adopting the same shorthand phrase that has been used by this Court. See *Turner* v. *Safley*, slip op. 1, 3 (noting that both the district court and the court of appeals, in relying on *Martinez*, had applied a "strict scrutiny" standard); *id.* at 9 (rejecting claim that prison officials should be subjected "to an inflexible strict scrutiny analysis"). In any event, regardless of the phrase that is used to describe the *Martinez* standard, the fact remains that the standard is substantially more onerous than the "reasonableness" standard that this Court has applied in every post-*Martinez* case involving prison administration (see Pet. 9). As the Court recognized in *Turner*, when it refused to apply the *Martinez* standard to regulations governing inmate-to-inmate correspondence, that standard "would seriously hamper" the ability of prison officials "to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration" (slip op. 9; see *id.* at 8). In short, respondents are simply wrong in portraying the *Martinez* standard as one that does not substantially interfere with the administration of federal prisons.

3. Respondents argue (Br. in Opp. 15-19) that review should be denied because all the circuits that have addressed similar issues have applied the *Martinez* standard. While we agree that there is no direct conflict among the circuits on this issue, we submit that the pertinent decisions have failed to analyze the issue properly. As we pointed out (Pet. 15 n.9), the court of appeals decisions relied upon by the court below (all of which were rendered prior to *Turner* and *Shabazz*) do not appear to rely on the

rights of outsiders; their holdings are apparently based entirely or primarily on the rights of prisoners. In light of *Turner* and *Shabazz*, it is now clear that the rights of prisoners must be assessed under a reasonableness standard. The two post-*Turner* and *Shabazz* cases cited by respondents (Br. in Opp. 16-18) do not satisfactorily address whether strict scrutiny should apply to prison rules that have an incidental impact on outsiders.[3] Because this

[3] In *Valiant-Bey* v. *Morris*, 829 F.2d 1441 (8th Cir. 1987), the court rejected the plaintiff's overbreadth claim and upheld the policies of a Missouri prison facility governing inmate correspondence, finding that those policies met the *Martinez* standard (*id.* at 1443-1444). The court therefore had no reason to consider whether a lower standard should be applied, and it did not cite *Turner* or *Shabazz*. To be sure, the court also held that plaintiff had sufficiently alleged that mail from a particular religious organization was improperly singled out for inspection and delayed delivery, in violation of *Martinez*. However, the court "express[ed] no opinion on the possible merits of [defendant's] claims," and it declined to decide whether a trial was warranted (829 F.2d at 1444). Furthermore, the court did not explain whether its holding was based on the rights of outsiders or only on the rights of the prisoner. The case therefore offers little guidance on the question presented here.

In *Lawson* v. *Dugger*, No. 86-5774 (11th Cir. Dec. 21, 1987), the court of appeals held that the *Martinez* standard applied to prisoners' claims that Florida prison officials had improperly restricted their access to literature from a certain religious organization. The court's initial opinion – which did not cite *Turner* or *Shabazz* – relied primarily on the rights of prisoners and did not analyze in any detail the rights of outsiders (see slip op. 2106, 2110-2112). In its opinion denying rehearing, *Lawson* v. *Dugger*, No. 86-5774 (11th Cir. Mar. 3, 1988), the court distinguished *Turner* and *Shabazz*, and it specifically adopted the approach taken by the District of Columbia Circuit in this case (see slip op. 2085-2086). However, the court simply assumed without discussion that the First Amendment rights of the religious group were the same as the First Amendment rights of the personal correspondents involved in *Martinez*. As we argued in the petition (Pet. 13-14), there is a critical distinction between the rights of the outsiders in *Martinez* and those of publishers or other outsiders.

is a nationwide class action binding on all federal prisons, and because the prior circuit court decisions have failed to analyze the issue properly, the absence of an inter-circuit conflict does not undermine our submission that review by this Court is warranted.

4. On the merits, respondents contend (Br. in Opp. 24-25) that the court of appeals was correct in applying *Martinez*. Yet, they do not explain how the interests of the publishers here are comparable to the interests of the outsiders in that case.[4] As we explained (Pet. 13-14), there are substantial reasons for drawing such a distinction. Similarly, respondents do not explain how their position can be squared with various decisions of this Court subsequent to *Martinez* that have applied a reasonableness standard even though the rights of nonprisoners were involved (see Pet. 14-15).

There is likewise no merit to respondents' claim (Br. in Opp. 25-28) that this Court's cases involving nonpublic forums are inapposite because the BOP's regulations are not "viewpoint-neutral." To begin with, the BOP regulations, as written and as applied, are concerned solely with publications that threaten security, discipline, or good

[4] Respondents note (Br. in Opp. 25) that "[i]t is ironic" that the government "seeks a lower level of constitutional protection for newspapers and other publications than for personal correspondence." But this Court in *Martinez* drew precisely such a distinction by specifically leaving open the question presented here (*i.e.*, whether a different standard applies in the case of mass mailings) (see 416 U.S. at 408 & n.11; Pet. 12). Respondents' suggestion (Br. in Opp. 24-25 n.10) that the publications at issue here are not the kind of "mass mailings" referred to in *Martinez* is based on an erroneous reading of that decision. The Court was clearly drawing a distinction between "direct personal correspondence" and items that are sent to many people, such as the publications at issue here (see 416 U.S. at 408 & n.11).

order (see Pet. App. 22a). Indeed, the regulations expressly provide that "[t]he Warden may *not* reject a publication solely because its content is religious, philosophical, political, social or sexual, or *because its content is unpopular or repugnant*" (*ibid.* (emphasis added)).[5]

Furthermore, respondents are simply wrong in contending that, even in nonpublic forums, *any* restriction based on content requires strict scrutiny (Br. in Opp. 25-28). For instance, in *Jones* v. *North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977), the Court upheld, under a reasonableness standard, prison restrictions on bulk mailings from unions, even though similar restrictions had not been imposed on bulk mailings from the Jaycees, Alcoholics Anonymous, and the Boy Scouts (see *id.* at 133). Clearly, the prison was drawing distinctions based on content by restricting only union-related bulk mailings, yet the Court refused to apply strict scrutiny in that setting.[6] In the present case, because a prison is clearly not a

[5] Respondents err in suggesting (Br. in Opp. 27) that petitioners have conceded (or that the court of appeals found) an intent to suppress expression because of a disagreement over content. Our statement that the regulations are "content-related" (Gov't C.A. Br. 33) can in no way be read as a suggestion that the regulations allow the suppression of speech merely because the BOP disagrees with the particular point of view expressed. Indeed, we specifically noted that the regulations had "the viewpoint-neutral purpose of safeguarding institutional security" (*ibid.*).

[6] See also *Hazelwood School District* v. *Kuhlmeier*, No. 86-836 (Jan. 13, 1988), slip op. 9 (holding that the high school newspaper at issue was not a public forum and that "school officials were entitled to regulate the contents of [the newspaper] in any reasonable manner"); *Greer* v. *Spock*, 424 U.S. 828, 831, 838-840 (1976) (upholding regulations prohibiting partisan political speeches on a military base, even though access to the base had been granted to nonpartisan speakers and groups); *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974) (plurality opinion) (upholding city's ban on political advertisements in rapid transit system because advertising space on a transit system

public forum, *id.* at 136; see also *Saxbe* v. *Washington Post Co.*, 417 U.S. 843 (1974), and because the regulations at issue do not restrict publications based on the BOP's disagreement with a particular viewpoint, a reasonableness standard should apply. See generally *Perry Education Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES FRIED
Solicitor General

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is not a public forum and because the restriction was based on legitimate concerns involving, inter alia, claims of favoritism that would most likely arise in the allocation of limited space).

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